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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMIE CONTRERAS, Defendant and Appellant.	B277699 (Los Angeles County Super. Ct. No. LAA083486)

APPEAL from a judgment of the Superior Court of Los Angeles County. Thomas Rubinson, Judge. Affirmed.

Elana Goldstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Jamie Contreras (defendant) was convicted by a jury of one count of unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a)). The court sentenced defendant to the midterm of two years in prison to be served in county jail.

Defendant appeals from the judgment of conviction, contending the trial court erred when it failed to revoke his self-representation and appoint counsel and also erred in imposing a felony sentence for his Vehicle Code section 10851 conviction in the absence of evidence that the value of the vehicle exceeded $950, as required by Proposition 47. We conclude that the trial court did not err in permitting defendant's continued self-representation and did not abuse its discretion in proceeding with the trial in defendant's voluntary absence. Further, Proposition 47 does not apply to Vehicle Code section 10851 and defendant's felony sentence is proper. Accordingly, the judgment of conviction is affirmed.

BACKGROUND

On May 15, 2016, Candi Smith realized her 1972 Winnebago was missing from its usual parking place in the vicinity of Tucker and Woodley streets in Los Angeles County. She had last seen the vehicle about three days earlier. Smith reported the Winnebago as stolen to law enforcement officials.

On May 22, 2016, Los Angeles Police Department Officers Jeff Rood and Ben Ellis noticed a decrepit Winnebago parked in the area of Vineland Avenue and Crockett Street. They checked the license plate number and learned the vehicle had been reported stolen. The officers pulled up behind the Winnebago and saw defendant come out of the passenger door and walk around to the driver's side. They detained defendant.

Defendant first told the officers he had purchased the vehicle from a woman in Simi Valley and then said it belonged to his aunt Evelyn. Defendant did not have keys, a bill of sale, registration or any proof of sale. He did not provide any information about Evelyn.

The Winnebago was returned to Smith. She noticed it had been damaged and personal property was missing from it.

DISCUSSION

I. Absence from Trial

After a jury panel had been called for voir dire, defendant, who was representing himself, announced he did not want to participate in a trial presided over by the assigned judge. Defendant chose to absent himself from the courtroom, and trial proceeded in his absence. He now contends the trial court erred in failing to terminate his self-representation when he refused to appear and to appoint counsel to represent him in his absence. He contends the failure to do so amounted to deprivation of his constitutional right to counsel at a critical stage of the proceedings. In the alternative, defendant contends the trial court abused its discretion in failing to appoint counsel.

A. Procedural history

On June 29, defendant made a motion to represent himself. During the hearing, defendant said, "I understand I have a right also to someone to advise, be behind me and advise me, also." The court corrected defendant, stating, "You're not going to have cocounsel sitting with you at the attorney table. If you want to be the attorney, you're the attorney." Later in the hearing, the court reiterated, "You do not have the right to cocounsel . . . sitting at the table with you. . . . I will appoint standby counsel if you would like me to do that, but if standby counsel has to take over the case in the middle, they will be at a serious disadvantage." The court had previously

explained, "A standby counsel comes in and represents you if you decide you don't want to do this anymore." The trial court granted defendant's request for self-representation. Defendant did not request standby counsel.[1]

On August 17, the day before trial was scheduled to start, defendant stated he wanted to file a motion pursuant to Code of Civil Procedure section 170.6 to recuse the judge. The trial court denied the motion as untimely. Defendant then stated, "I don't feel I'm having a fair hearing here with you, you know. I feel that you're prejudiced against me." The court stated that it was not prejudiced against defendant. Defendant said, "Well, what if I refuse coming into your court?" The court answered, "We'll do the trial without you if you don't want to be present. That's your right if you want to recuse yourself. If you want to be present, of course, you have the right to do that. If you'd rather move forward in your absence and excuse yourself, that's fine, too." Defendant replied, "I don't want to excuse myself. I want to excuse you."

Defendant next made a number of unsuccessful motions. He then asked the court, "Would you consider a court panel attorney?" The court replied, "No, it's the public defender." Defendant made it clear that he did not want the public defender. Various matters were then discussed. After the trial court explained the rules of conduct during trial, defendant asked, "You don't want to consider a court panel—a Cal panel attorney?" The court replied, "I do not." Defendant then expressed his dissatisfaction with his former public defender stating, "My public defender was not doing anything for me" and "If you would see the transcripts on the preliminary hearing, you

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[1] Defendant maintains on appeal that he did request standby counsel. It is far from clear that defendant had understood what standby counsel was, and when he learned that any counsel appointed in any capacity would be from the public defender's office, he rejected such counsel.

could see why I fired—well, why I didn't want—why I went pro. per." Defendant asked, "Why can't I get a state-appointed?" The court explained that he did not get to choose.

On August 18, after the lunch recess and before the jury panel was brought into the courtroom, defendant stated he did not feel that he would receive a fair trial with the current judge. The trial court explained it would be trying the case, and told defendant, "you don't have to be present for it, but the trial will go forward. If you want to voluntarily absent yourself from it, that's fine, but we will be doing this trial." Defendant replied by asking, "Do I have a standby attorney like I think I'm supposed to? . . . I've asked for a state-appointed attorney." The court replied, "I can appoint standby counsel. They're not going to know anything about the case, but—" Defendant asked, "Why can't I get a state-appointed attorney? I mean, so I could have some—I mean, I'm here by myself. I'm here alone, man." The court replied that he had already explained that to defendant.

The trial court asked defendant if he wanted to bifurcate the trial of the prior conviction allegations. Defendant responded by claiming this was something new and the trial court was prejudiced toward him. The court stated that it was going to bifurcate the priors "for the benefit of the defendant." Defendant said, "I don't want to be here. . . . I don't want you to try my trial." The court asked for the jury to be brought in, and defendant asked, "May I be excused?" The court told defendant he had the right to be absent from the trial. Defendant stated he wanted to be present but did not want this court to conduct the trial.

The court stated it was bringing the jury in. Defendant replied, "I'd rather be excused, but I'm not voluntary." The court replied, "You are. You have every right to be present here." The court added, "If you're going to just

say whatever you want and start making accusations against the judge in front of the jury, you're not going to be in here." Defendant replied, "I'd rather not be here, then."

The court found defendant was voluntarily absenting himself. The prosecutor asked the court if it wanted to address revoking defendant's pro. per. status given his voluntary absence. The court elaborated: "He's well aware of his right to have a lawyer. He just wants to try to manipulate the situation and try to dictate which lawyer he's going to get, and that's just not the way it works and I've made that crystal clear to him. He just doesn't want to accept that reality. I'm not going to infringe upon his right to self-representation. That's a very, very large step to take and I'm not going to do that."

B. Applicable law

A criminal defendant has a state and federal constitutional right to be present at trial. The right, however, is not an absolute one. It may be expressly or impliedly waived. (*People v. Espinoza* (2016) 1 Cal.5th 61, 72 (*Espinoza*).) This is true even when the defendant is representing himself. (*Id*. at p. 74.)

"'[W]here the offense is not capital and the accused is not in custody, *the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this* does not nullify what has been done or prevent the completion of the trial, but, on the contrary, *operates as a waiver of his right to be present and leaves the court free to proceed* with the trial in like manner and with like effect as if he were present.' (*Diaz v. United States* (1912) 223 U.S. 442, 455, italics added.) Section 1043(b)(2) has adopted this majority rule as state law. [Citation.] Section 1043(b)(2) is similar to its federal counterpart, rule 43 of the Federal Rules of Criminal Procedure (18

U.S.C.), which, we note, the high court has found to be constitutional. (*Taylor v. United States* (1973) 414 U.S. 17, 18; [*People v.*] *Gutierrez* [(2003) 29 Cal.4th 1196,] 1204.)" (*Espinoza, supra,* 1 Cal.5th at p. 72.)

"'In determining whether a defendant is absent voluntarily, a court must look at the "totality of the facts."' [Citation.]" (*Espinoza, supra,* 1 Cal.5th at p. 72.) If a defendant absents himself from trial, the record must ""'clearly establish[] that his absence is voluntary. He must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away.'" (*Taylor* [*, supra*, 414 U.S.] at p. 19, fn. 3.)" (*Espinoza, supra,* 1 Cal.5th at p. 74.)

If the defendant has voluntarily absented himself from trial, "the decision whether to continue with a trial in absentia under the statute or to declare a mistrial rests within the discretion of the trial court." (*Espinoza, supra,* 1 Cal.5th at p. 75.) In some circumstances, a trial court may have grounds to terminate the defendant's self-representation and appoint counsel to represent him at trial. (*Id*. at pp. 76-77.)

C. Voluntary absence

"The role of an appellate court in reviewing a finding of voluntary absence is a limited one. Review is restricted to determining whether the finding is supported by substantial evidence. [Citation.]" (*Espinoza, supra,* 1 Cal.5th at p. 74.)

Here, the trial court's ruling that defendant's absence was voluntary is supported by substantial evidence. Defendant expressly stated he was choosing to absent himself from the courtroom. The record shows he knew trial was about to begin. The trial court advised him he had the right to be present, but if he absented himself, trial would proceed without him. Thus, defendant expressly waived his right to be present. No forces beyond his

control contributed to his absence: defendant was in custody, was brought to the courthouse at the appropriate times, and was not ill. Defendant's professed reason for his absence was not a valid one: he stated he was going to absent himself because he believed the trial court was prejudiced against him and he would not receive a fair trial. There is, however, nothing at all in the record to support defendant's accusations.

D. No abuse of discretion

Because the defendant voluntarily absented himself from trial, the court had discretion to decide whether to continue with the trial in his absence or to declare a mistrial. (*Espinoza, supra,* 1 Cal.5th at p. 75.) We see no abuse of discretion in the court's decision to continue with the trial. (See *id*. at pp. 77-79 [no abuse of discretion where trial court reasonably found defendant's failure to appear was an attempt to manipulate the court; defendant's absence came late in proceedings, after first witness was sworn; mistrial offered no certainty defendant would appear in the future; and court protected defendant's rights through jury instructions].)

Here, the trial court reasonably found defendant "just wants to try to manipulate the situation and try to dictate which lawyer he's going to get, and that's just not the way it works and I've made that crystal clear to him. He just doesn't want to accept that reality." In addition, defendant's stated reason for his absence was an attempt to avoid trial by the assigned judge, whom he repeatedly but baselessly described as prejudiced. Thus, declaring a mistrial would have been a waste of judicial resources, since defendant still would not have the right to select his court-appointed attorney, or to recuse the assigned judge. Even assuming scheduling requirements resulted in the assignment of a different judge, there is no certainty of a different result, given defendant's history of baseless accusations of prejudice. (See *Espinoza,*

supra, 1 Cal.5th at p. 78 [mistrial would be a waste of resources "with no certainty of a different result, given defendant's history of delay tactics"].)

Defendant waited until very late in the proceedings to decide to absent himself. He first suggested he might refuse to be present at trial on the day before jury selection was set to begin. He announced his decision to absent himself the next day, moments before the jury panel was brought into the courtroom. Delaying the trial would have inconvenienced witnesses and disrupted the orderly court process.

The trial court protected defendant's interests in his absence. Before jury selection began, the court instructed the jury panel that defendant had voluntarily decided he did not want to be present for trial. "He has the right to what they call absent himself, and that's what he's decided to do. . . . And that is sanctioned by the law." In concluding instructions, the court told the jury the defendant has decided "to exercise his constitutional right to act as his own attorney in this case and indeed to absent himself from trial, as well. Do not allow those decisions to affect your verdict."[2]

Accordingly, the trial court did not abuse its discretion in proceeding with the trial rather than declaring a mistrial.

Defendant argues the trial court abused its discretion because it failed to recognize it had a third option: revoking his right to self-representation and appointing counsel on the ground that his refusal to come to court was misconduct designed to disrupt the proceedings. He contends this was in fact the only appropriate action.

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2 The jury submitted questions to the People's witnesses (through the court) which showed skepticism of testimony on some topics and/or concern with a lack of testimony on other topics, thereby demonstrating that the jury did not favor the prosecution due to defendant's absence.

In response to the prosecutor's suggestion that the trial court consider revoking defendant's pro. per. status, the court responded, "I'm not going to infringe upon his right to self-representation. That's a very, very large step to take, and I'm not going to do that." Thus, the court was clearly aware of the option described by defendant on appeal.

As our Supreme Court explained in *Espinoza*, while revoking a defendant's pro. per. status and appointing counsel to represent defendant can be a third alternative to proceeding without the defendant or declaring a mistrial, revocation is not required in every instance of voluntary absence. In *Espinoza*, as here, the defendant had a history of dissatisfaction with appointed counsel and chose self-representation rather than continue being represented by appointed counsel. The Court in *Espinoza* held that under such circumstances the trial court was not required to revoke Espinosa's self-representation and re-appoint counsel. (*Espinoza, supra*, 1 Cal.5th at pp. 77-78.) The Court pointed out that the U.S. Supreme Court had "explained in *Faretta* itself, '[t]o thrust counsel upon the accused, against his considered wish, . . . violates the logic of the [Sixth] Amendment.' (*Faretta* [*v. California* (1975)] 422 U.S. [806,] 820.) 'An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.' (*Id.* at p. 821.) '[T]he core of the *Faretta* right' is that 'the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury.' (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 178.) That right of control includes 'the option of conducting his defense by nonparticipation.' (*People v. McKenzie* (1983) 34 Cal.3d 616, 628.)" (*Espinoza, supra,* 1 Cal.5th at p. 77.)

Defendant contends the reasoning of *Espinoza* only applies to defendants who are not in custody. Nothing in *Espinoza* suggests such a limitation. The Court in *Espinoza* mentioned the defendant's custody status because the defendant failed to appear for the second day of trial without explanation, an option not often available to in-custody defendants. Attempts to contact him were futile and a search for him fruitless. (*Espinoza, supra*, 1 Cal.5th at pp. 69-70.) Since there was no express waiver by Espinoza of his right to be present, the Supreme Court considered whether Espinoza's conduct amounted to an implied waiver. No other part of the analysis in *Espinoza* relates to the defendant's custody status.

Defendant contends the Court of Appeal in *People v. Ramos* (2016) 5 Cal.App.5th 897, 913, distinguished *Espinoza* on the basis of the defendant's custody status, and also on the voluntariness of his absence. The court in *Ramos* did not distinguish *Espinoza* on the basis of custody status. The court did make the (valid) distinction that the defendant in *Espinoza* was voluntarily absent while the defendant in *Ramos* was involuntarily absent. Defendant attacks this distinction, arguing there is no reason to treat defendants who voluntarily absent themselves from trial differently than those who are involuntarily absent. As the Supreme Court explained in *Espinoza*, the "core" of the right to self-representation is the defendant's right to "'actual control over the case he chooses to present to the jury,'" including "'the option of conducting his defense by nonparticipation.'" (*Espinoza, supra*, 1 Cal.5th at p. 77.) A defendant who chooses not to appear for trial thus is exercising "actual control over the case" he presents to a jury. (*Ibid.*) A defendant who is involuntarily absent, due to misconduct or misfortune, is not exercising such control. In the case of misconduct resulting in

involuntary absence, revocation of self-representation may be warranted. It is appropriate to treat the two types of absences differently.

II. Proposition 47

Defendant contends Vehicle Code section 10851 is a theft offense which was reclassified by Proposition 47 to make thefts of less than $950 misdemeanors. He maintains the prosecutor was required to prove the Winnebago was worth more than $950 in order for the conviction to be a felony. Defendant claims there is no evidence at all of the value of the Winnebago.[3]

The issue whether Proposition 47 applies to Vehicle Code section 10851 is currently pending before the California Supreme Court in *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793, and related cases. Absent further guidance from the Supreme Court, and for reasons we discuss below, we hold that Proposition 47 does not apply to defendant's conviction under Vehicle Code section 10851.

Proposition 47 added section 1170.18 to the Penal Code,[4] and amended or added to certain other provisions of the Penal Code to reclassify certain offenses as misdemeanors. Subdivision (a) lists those other sections as Health and Safety Code sections 11350, 11357 and 11377, and Penal Code sections 459.5, 473, 476a, 490.2, 496, and 666. Vehicle Code section 10851 is not an enumerated offense. This is not an inadvertent omission: the

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[3] Respondent contends defendant has forfeited this claim by failing to make a section 995 motion to set aside the information after the preliminary hearing. (Pen. Code, § 996.) As defendant confirms in his reply brief, he is arguing there was no evidence at trial concerning the value of the Winnebago and so no evidence to support felony sentencing. This claim is not forfeited.

[4] All further undesignated statutory references are to the Penal Code.

language of Vehicle Code section 10851 has not been amended or added to by Proposition 47.

Defendant relies on section 490.2 to support his argument that Proposition 47 nevertheless applies to Vehicle Code section 10851. Section 490.2 is listed in section 1170.18, subdivision (a) and provides: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor." (§ 490.2, subd. (a).)

Defendant contends Vehicle Code section 10851 is a lesser included offense of section 487, subdivision (d)(1), grand theft auto. (*People v. Barrick* (1982) 33 Cal.3d 115, 128, superseded by statute on another issue; *People v. Buss* (1980) 102 Cal.App.3d 781, 784.) He maintains that section 490.2 does not distinguish between different types of theft; it only differentiates thefts by the dollar figure of the property taken. Thus, he concludes that Vehicle Code section 10851 is a theft offense under section 490.2, subdivision (a) and may only be sentenced as a felony if the value of the property taken exceeds $950.

Defendant urges that if the statutory language is ambiguous, it must be interpreted in favor of the defendant. (*People v. Arias* (2008) 45 Cal.4th 169, 177 ["If a statute defining a crime or punishment is susceptible of two reasonable interpretations, we ordinarily adopt the interpretation that is more favorable to the defendant."]; *People v. Avery* (2002) 27 Cal.4th 49, 57 [the "rule of lenity" dictates that "courts must resolve doubts as to the meaning of a statute in a criminal defendant's favor"].)

Section 490.2, on its face, does no more than amend the definition of grand theft, as defined in section 487 "or any other provision of law" by redefining a limited subset of offenses as petty theft that formerly would have been grand theft. (§ 490.2, subd. (a).) Vehicle Code section 10851 does not define the taking a vehicle as grand theft or petty theft; rather, it proscribes taking or driving a vehicle "with or without intent to steal." (Veh. Code, § 10851, subd. (a).) Our Supreme Court noted in *People v. Garza* (2005) 35 Cal.4th 866, that Vehicle Code section 10851 "'proscribes a wide range of conduct.' [Citation.] A person can violate section 10851(a) 'either by taking a vehicle with the intent to steal it or by driving it with intent only to temporarily deprive its owner of possession (i.e., joyriding).' [Citations.]" (*Garza,* at p. 876.) Vehicle Code section 10851 does not come within the ambit of section 1170.18 by operation of section 490.2.

Further, even if section 490.2 applied to convictions under Vehicle Code section 10851 which are the equivalent of theft because they involve the intent to permanently deprive the owner of his or her property, this was not such a case. The prosecutor in this case originally charged defendant with grand theft auto as well as a violation of Vehicle Code section 10851. Just before jury selection began, the prosecutor announced he was not going to proceed on the grand theft charge and dismissed it. During closing arguments, the prosecutor argued, "It's two elements when you look at the actual jury instruction; that the defendant took or drove someone else's vehicle without the owner's consent and that when the defendant did so he intended to deprive the owner of possession or ownership of the vehicle for any period of time. That's the crime. Those are the acts that we're concerned with. You heard the officer say some things about a grand theft auto investigation. That's not what we're talking about."

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

CHAVEZ, J.

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* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.